No. 83-1069

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

FRANK R. SARGENT,
Appellant,

vs.

CALIFORNIA SUPREME COURT, CALIFORNIA COURT OF APPEAL—SECOND APPELLATE DISTRICT, GREAT AMERICAN INSURANCE COMPANY,
Appellees.

On Appeal from the California Court of Appeal Second Appellate District

MOTION OF APPELLEE GREAT AMERICAN INSURANCE COMPANY TO DISMISS OR AFFIRM

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February 2, 1984

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rules

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I

INTRODUCTION

Appellee Great American Insurance Company (referred to hereinafter as "Appellee") moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Second District, on the ground that jurisdiction has not been properly invoked because the asserted federal question was not presented to, nor was it considered or decided by, the court below.

II

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal purports to raise the question whether California Code of Civil Procedure section 583(b),[1] mandating dismissal of civil actions which are not brought to trial within five years after commencement, violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

B. The Proceedings Below

Appellant filed a civil action against Appellee, among others, in the Superior Court of California, County of San Francisco, on January 4, 1974. On October 19, 1978, Appellant filed a written stipulation between Appellee and Appellant extending the five year time limit set forth in Code of Civil Procedure Section 583(b). At the expiration of the five year period as extended by the stipulation, trial of Appellant's action had not commenced. Following a hearing noticed by Appellee, the action was ordered dismissed with prejudice on June 23, 1980. Appellant noticed

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[1]Code of Civil Procedure section 583(b) (Stats. 1905 ch. 271 § 1, as amended (Deering, 1972) reads as follows:

> Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendants, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

a timely appeal to the California Court of Appeal, California's court of last resort except for discretionary review by the California Supreme Court.[2]

The California Court of Appeal affirmed the judgment of dismissal by an unpublished opinion reprinted in the appendix to Appellant's Jurisdictional Statement at pages App. 1-App. 10. Appellant's petition for rehearing before the Court of Appeal was denied and his petition for a discretionary hearing before the California Supreme Court was denied. See page App. 11 of Appellant's Jurisdictional Statement. As review by the California Supreme Court is

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[2]Article VI, section 11, of the California Constitution (Deering, 1974) provides as follows:

> The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction . . . .

Rule 29 of the California Rules of Court (Deering, 1980) states:

> (a) A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.
>
> (*b*) *As a matter of policy, on petition for hearing the Supreme Court normally will not consider:*
>
> *(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;*
>
> (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for hearing without the necessity of filing a petition for rehearing. [Emphasis added.]

discretionary, see footnote 2, *supra*, it is the decision of the California Court of Appeal, Second District, which Appellant seeks to bring before this Court. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678, n. 1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

III

ARGUMENT

A. Appellant Did Not Raise, And The Court Below Did Not Consider Or Decide, The Asserted Federal Question

This appeal should be dismissed because Appellant did not raise the purported federal question before the California Court of Appeal and that court did not consider or decide the question. 28 U.S.C. section 1257(2) is the jurisdictional predicate for this appeal. See Appellant's Jurisdictional Statement at p. 2. That section requires that the judgment or decree appealed from have "drawn in question" a state statute as repugnant to the Constitution, treaties or laws of the United States.

The opinion of the California Court of Appeal makes no reference whatever to Appellant's asserted due process claims. In that circumstance the Court will assume "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). Rule 15.1(g) of the Court's rules require that Appellant specify the manner in which the federal question was raised in both the court of first instance and the appellate court. Appellant has failed to do so.

Appellant has failed to show that the asserted federal question was raised in opposition to Appellee's motion to dismiss the action in the trial court, or that it was raised before the California Court of Appeal. The only reference Appellant made in the courts below to due process is set forth at page App. 18 of Appellant's Jurisdictional Statement: "Any delays occasioned by this motion will be a violation of plaintiff's rights to due process." That one sentence was written not in opposition to Appellee's motion to dismiss the action under California Code of Civil Procedure section 583(b), the statute under attack in this appeal, but in a brief in opposition to an unrelated motion heard nearly two years before the dismissal, on October 25, 1978.[3] The asserted federal question was not raised before the trial court when it granted Appellee's motion to dismiss the action pursuant to Code of Civil Procedure section 583(b), and was never raised before, considered or decided by the California Court of Appeal.

This Court has ruled on numerous occasions that jurisdiction attaches only when the Federal question has been raised at the proper time in the state court proceeding. *Webb v. Webb,* 451 U.S. 493, 496-499 (1981); *Cardinale v.*

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[3]Even if it is assumed, *arguendo,* that the sentence quoted above was before the trial court at the time it ruled to dismiss the action, it cannot be concluded that the federal question was properly raised in the state court. First, although Appellant's briefs in the California Court of Appeal are not part of the record, they make absolutely no mention of any "due process" claims. Second, Appellant did not specify that the Federal Constitution was being raised in using the term "due process." The California Constitution, Article I, section 7 (Deering 1974), provides a right to "due process" as well: "A person may not be deprived of life, liberty or property without due process of law . . . ."

Louisiana, 394 U.S. 437, 438 (1969). The Court stated in *Webb v. Webb*, *supra*, 451 U.S. at 499, that

> it is appropriate to emphasize again . . . that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts.

Appellant may not raise the federal question for the first time before this Court. *White River Lumber Co. v. Arkansas ex rel. Appelgate*, 279 U.S. 692, 700 (1929).

IV

CONCLUSION

Wherefore, Appellee respectfully submits that the Court's jurisdiction has not been reached, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the California Court of Appeal, Second District.

Respectfully submitted,
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